

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Redevelopment of Spectrum to
Encourage Innovation in the
Use of New Telecommunications
Technologies

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ET Docket 92-9

To: The Commission

**REPLY COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION
ON PETITIONS FOR RECONSIDERATION/CLARIFICATION**

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April 14, 1993

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 OFFICE OF THE SECRETARY

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**REPLY COMMENTS OF THE
 AMERICAN PUBLIC POWER ASSOCIATION
 ON PETITIONS FOR RECONSIDERATION/CLARIFICATION**

Pursuant to Section 1.429(g) of the Commission's Rules, the American Public Power Association (APPA) hereby respectfully submits the following reply to the comments filed on APPA's "Petition for Clarification" with respect to the First Report and Order (First R&O), FCC 92-437, released October 16, 1992, in the above captioned matter.¹

I. Introduction

APPA, as the national service organization representing more than 1,750 local, publicly owned electric utility systems throughout the country, has actively participated in this proceeding on behalf of its members with licenses for fixed microwave facilities in the 2 GHz band. While APPA generally concurs with policies and rules adopted by the Commission in its First R&O, Rule Section 94.59(b) as issued would reverse previous Commission policy statements in this proceeding by failing to protect all state and local government licensees from forced relocation from the 2 GHz band. It is for this reason that APPA filed its petition on November 30, 1992.

^{1/} These reply comments are timely filed in accordance with the specifications of FCC Rule Section 1.4(h) regarding the filing of responses to comments served by mail.

II. Record Shows Restriction of Exemption Would Be Inconsistent With Proposal

As established in APPA's Petition, the Docket clearly establishes that the Commission intended from the initiation of this proceeding through the adoption of the First R&O that all state and local government agencies would be exempted from forced relocation from the 2 GHz band. APPA's position was supported by a separate Petition for Reconsideration/Clarification filed by the Utilities Telecommunications Council (UTC), as well as comments on these petitions filed by UTC, the Lower Colorado River Authority (LCRA), and Public Safety Microwave Committee (PSMC).

However, Cox Enterprises, Inc. (Cox), Omnipoint Communications, Inc. (Omnipoint), and American Personal Communications (APC) contend that the portion of the First R&O limiting the exemption to public safety entities was the result of an intentional decision of the Commission. In fact, Omnipoint argues that the Commission's rule "is entirely consistent with past Commission policy statements in this proceeding."²

The facts belie this contention. Even Omnipoint acknowledged that the Commission, in paragraph 25 of its Notice of Proposed Rule Making (NPRM) in this proceeding, expressed concern "that state and local government agencies would face special economic and operational considerations in relocating..."³ Paragraph 25 goes on to state, "To address these concerns, we propose to exempt state and local government 2 GHz fixed microwave facilities from any mandatory

²/ Comments of Omnipoint at p. 3.

³/ Id.

transition periods. Rather, these facilities would be allowed to continue to operate at 2 GHz on a co-primary basis indefinitely..."

This intention was also demonstrated in the news release issued by the Commission upon the adoption of the NPRM, which stated, "To minimize further the costs to existing licensees and disruption of service, the Commission proposed...permitting state and local government fixed microwave facilities to continue to operate on a primary basis indefinitely."⁴ The Commission further clarified its intent in more than 50 responses to Congressional inquiries. Former Chairman Alfred C. Sikes and Chief Engineer Thomas P. Stanley assured concerned U.S. Senators and Congressmen that "the proposal specifically excluded state and local government entities, including public safety, from any mandatory move to higher frequencies."⁵ Recognizing that "there has been some confusion about how this proposal would impact local and state government agencies," Former Chairman Sikes and Chief Engineer Stanley also provided to some of the concerned legislators a fact sheet which indicated that, under the

4/ "Allocation of Emerging Technology Bands for Future Requirements Proposed," News Release, ET Docket 92-9 (January 16, 1992).

5/ See letters from Former Chairman Sikes to: Rep. Gallegly (June 12, 1992); Rep. Lent (April 7, 1992); Rep. Bunning (March 10, 1992); Sens. D'Amato and Moynihan and Reps. Horton and Scheuer (March 10, 1992); Reps. Applegate, Boehner, Feighan, Gillmor, Gradison, Hall, Hobson, Kaptur, Kasich, Luken, McEwen, Miller, Oaker, Oxley, Regula, Sawyer, Stokes, Traficant, and Wylie (March 4, 1992); Reps. Dannemeyer and Moorhead (March 3, 1992); Rep. Nagle (February 6, 1992); Rep. Scheuer (February 3, 1992); and Rep. Gekas (January 31, 1992). See also letters from Chief Engineer Stanley to: Sen. Thurmond (July 8, 1992); Sen. Cranston (May 13, 1992); Rep. Packard (March 25, 1992); Sen. Cranston (March 24, 1992); Sens. Gramm and Graham (March 11, 1992); Rep. Packard and Sen. Sarbanes (March 6, 1992); Sen. Gramm (March 5, 1992); Sen. Wofford (March 4, 1992); Rep. Gunderson (March 2, 1992); Sen. Pryor (February 27, 1992); Sen. Bentsen (February 26, 1992); Sen. Danforth (February 19 and 21, 1992); Sen. Rockefeller (February 19, 1992); Sens. Simpson and Wallop and Rep. Thomas (February 6, 1992); Sen. Symms and Rep. McCandless (February 3, 1992); Sen. Harkin and Rep. Grandy (January 29, 1992); and Sen. Domenici and Reps. Kleczka and Kohl (January 23, 1992).

FCC proposal, "All existing state and local government operations, including public safety, [would] be exempted from any mandatory move to higher frequencies."⁶

As previously established in APPA's petition, the news release announcing the Commission's adoption of the First R&O indicated that, under the rule, "2 GHz fixed microwave operations licensed to state and local governments, including public safety, would be exempt from any voluntary relocation." It was not until the First R&O was released on October 16, 1992, that the language consistently used throughout the proceeding by the Commission and its staff was reversed to indicate that only those facilities licensed to the public safety and special emergency radio services, including state and local governments, would be exempted from any forced relocation.⁷

Omnipoint contends that this reversal of previous phraseology was deliberate, reflecting a conscious decision of the Commission to limit the exemption only to those state and local government agencies licensed to the public safety and emergency radio services. However, again the Docket indicates that the Commission intended to extend the exemption to all state and local government licensees, regardless of the radio service classification to which their 2 GHz licenses were issued. In a letter to U.S. Rep. Peter Hoagland dated November 10, 1992 -- almost a full month after the First R&O was released -- Former Chairman Sikes said, "The Commission exempted 2 GHz fixed

6/ Id.

7/ First R&O, para. 26.

microwave operations licensed to state and local governments, including public safety, from any involuntary relocation..."⁸

The record in the Docket speaks for itself. To restrict the exemption to only those licenses issued to the Public Safety and Emergency Radio Services would be inconsistent with the policy statements issued by the Commission and its assurances to the U.S. Congress that state and local government licensees would be allowed to operate in the band indefinitely.

III. Clarification Does Not Represent Expansion of Exempt Licensees

Cox, APC, the North American Telecommunications Association (NATA), and Apple Computer, Inc. (Apple) express concern that by clarifying the rule as proposed in APPA's petition, the Commission would be expanding greatly the number of microwave licensees exempt from involuntary relocation. APPA takes exception to this argument for the following reasons.

First, this argument is predicated on the assumption that the Commission deliberately worded the rule to exclude from the exemption state and local government fixed microwave facilities licensed to the Industrial Radio Services. However, as previously demonstrated, the Commission intended from the start to exempt all state and local government licensees. Again, the fact sheet distributed by the FCC in response to Congressional inquiries indicates that the Commission was cognizant of the number of state and local government licensees in the 2 GHz band when it proposed its exemption:

⁸/ Letter from Former Chairman Sikes to Rep. Hoagland (November 10, 1992), ET Docket 92-9.

Impact on State and Local Governments- Existing 2 GHz microwave spectrum is currently used by a wide variety of entities and businesses to provide point-to-point communications services. State and local government entities, including public safety, have significant operations in this band. State and local government licensees represent about 20% of the operations in this band. To ensure that these operations would not be harmed, the FCC proposed that:

- All existing state and local government operations, including public safety, be exempted from any mandatory move to higher frequencies.
- Such operations can continue to operate indefinitely and would be protected from interference from any future new technology operations. [Emphasis added.]⁹

Second, the number of licenses which would be affected by APPA's proposed clarification has been greatly exaggerated by Cox, APC, NATA, and Apple. Their estimates are all over the lot, from clearing only 30 to 40 MHz of the 2 GHz band¹⁰ to exempting more than 2,000 facilities.¹¹ However, the Commission estimates that state and local government licensees represent only about 20 percent of the users of the 2 GHz band.¹² The Commission was aware all along of the extent of state and local government licensees and yet did not blanch when it proposed to exempt all of these licensees from forced relocation.

Third, there is nothing in the Commission's rules, including the First R&O, that would prevent state and local government agencies licensed to the Industrial Radio Services from amending their licenses to the Local Government Service under the Public Safety and Emergency Radio Services. As noted in APPA's and UTC's petitions, practically all political subdivisions of state and

⁹/ "Activities Affecting State and Local Government Spectrum," Fact Sheet, ET Docket 92-9.

¹⁰/ Comments of Cox at p. 11.

¹¹/ Comments of APC at p. 2.

¹²/ Fact Sheet, op. cit.

license under one radio service as another. Indeed, several of APPA's members hold licenses for their 2 GHz fixed microwave networks under both the Industrial Radio Services and the Public Safety and Emergency Radio Services. For example, the Nebraska Public Power District holds 100 power radio licenses under the Industrial Radio Services and 10 local government radio licenses under the Public Safety and Emergency Radio Services -- all for the same microwave system serving the same general purpose! To arbitrarily decide at this late date that a decision of no real significance made some time ago now will significantly affect a licensee's future operations is patently unfair.

V. Conclusion

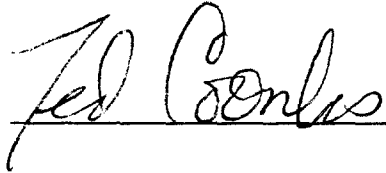
The record clearly demonstrates that the Commission, with full knowledge of the consequences of its actions, intended from the initiation of this proceeding to exempt all state and local government 2 GHz microwave licensees from forced relocation from the band. The record also indicates that, even after the First R&O was issued, the Commission still thought it had exempted all state and local governments.

The exclusion from the exemption of those state and local governments whose licenses were not issued under the Public Safety and Emergency Radio Services was obviously an oversight rather than a deliberate act. Clarifying the rules as proposed by APPA and UTC would not expand the number of licensees eligible for the exemption, because all of these licensees presumably could amend their licenses to become eligible. Instead, clarifying the rules would save these state and local government licenses, as well as the FCC staff, considerable clerical work and expense.

WHEREFORE, THE PREMISES CONSIDERED, the American Public Power Association respectfully requests the Commission to take actions consistent with the views expressed herein.

Respectfully submitted,

American Public Power Association

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April 14, 1993

CERTIFICATE OF SERVICE

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